Eight Mile Style, LLC et al v. Apple Computer, Incorporated Doc. 128

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

_____________________________________/

DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' LATE-DISCLOSED CLAIM OF ENTITLEMENT TO PROFITS FROM SALES OF IPODS BY APPLE INC. UNDER FED. R. CIV. P. 37, SETTLED COPYRIGHT LAW, AND FED. R. EVID. 702

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Defendants Aftermath Records d/b/a Aftermath Entertainment ("Aftermath") and Apple Inc. ("Apple") (jointly "Defendants") respectfully move the Court for an Order excluding Plaintiffs' damages claim, disclosed for the first time nearly two years after this case was filed and well after the close of discovery, for a portion of Defendant Apple Inc.'s profits from its sales of iPod digital media players. This motion is made on the grounds that such a claim for damages was never disclosed throughout fact discovery, its inclusion in the case at this late date would substantially prejudice Defendants (with the trial in this case set to begin in just over a month), and that the claim in all events is legally unsupportable under the law of copyright and Federal Rule of Evidence 702.

In light of the impending trial and continuing prejudice as a result of this late-disclosed claim, Defendants respectfully request that this Court set this Motion for hearing as soon as possible, preferably at the final pretrial conference in this matter currently scheduled for September 10.

Pursuant to Local Rule 7.1, Defendants sought Plaintiffs' consent to this Motion, but Plaintiffs would not consent to the relief sought.

WHEREFORE, Defendants respectfully request that this Court grant this Motion.

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' LATE-DISCLOSED CLAIM OF ENTITLEMENT TO PROFITS FROM SALES OF IPODS BY APPLE INC. UNDER FED. R. CIV. P. 37, SETTLED COPYRIGHT LAW, AND FED. R. EVID. 702

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CONCISE STATEMENT OF ISSUES PRESENTED

Whether the Court should exclude Plaintiffs' claim, disclosed for the first time nearly two years into this litigation (and less than 90 days before trial), for indirect profits from Apple's sales of iPod digital media players when:

1. Plaintiffs, through nearly two years of litigation, had never even hinted that their damages claim would include any request for iPod profits, and did so only after being subject to a $2.5 million judgment entered against them in another federal court;

2. The theory in any event is without merit, and not subject to trial, where Plaintiffs' expert himself admits that the portion of iPod profits attributable to the allegedly infringing use here is "speculative" and "indeterminate"; and

3. Defendants would be severely prejudiced by the late introduction of this potentially substantial damages claim, even if ultimately unsuccessful at trial?

Defendants' answer: Yes.

CONTROLLING AUTHORITIES

Federal Cases

Burns v. Imagine Films Entertainment, 2001 WL 34059379 (W.D.N.Y. Aug. 23, 2001)

DaimlerChrysler Services v. Summit Nat'l, 2006 WL 208787 (E.D. Mich. Jan. 26, 2006)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

Dickenson v. Cardiac and Thoracic Surgery of Eastern Tenn., 388 F.3d 976 (6th Cir. 2004)

Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505 (9th Cir. 1985)

Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545 (9th Cir. 1989)

In re Scrap Metal Antitrust Litigation, 527 F.3d 517 (6th Cir. 2008).

Lowry's Reports v. Legg Mason, 271 F. Supp. 2d 737 (D. Md. 2003)

Mackie v. Rieser, 296 F.3d 909 (9th Cir. 2002)

Niemi v. American Axle Mfg., 2008 WL 1837253 (E.D. Mich. Apr. 23, 2008)

Rainey v. Wayne State Univ., 26 F. Supp. 2d 963 (E.D. Mich. 1998)

Roberts v. Galen of Va., Inc. 325 F.3d 776 (6th Cir. 2003)

Robinson v. Sanctuary Records, 542 F. Supp. 2d 284 (S.D.N.Y. 2008)

Thoroughbred Software Int'l, Inc. v. Dice Corp., 488 F.3d 352 (6th Cir. 2007)

Federal Statutes

17 U.S.C. § 504(a)
17 U.S.C. § 504(b)

Federal Rules

Federal Rule of Civil Procedure 26(a)

Federal Rule of Civil Procedure 37
Federal Rule of Civil Procedure 37(c)(1)
Federal Rule of Evidence 702

Other Authorities

4 Nimmer on Copyright, § 14.03[B][2]

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

In this lawsuit, Plaintiffs claim that the sale of certain records through Apple's iTunes Store infringes Plaintiffs' copyrights in musical compositions co-written by the recording artist known as Eminem. Plaintiffs have always maintained that their damages for the claimed infringement consist of Apple's profits from sales of these allegedly infringing recordings. Now, just weeks before trial, Plaintiffs have dramatically recast their damages theory to include Apple's profits from sales of entirely different, non-infringing products: iPod portable digital media players. Not only did Plaintiffs fail to disclose this demand, Plaintiffs' counsel disavowed any claim to profits from iPod sales over a year ago. The claim is legally barred in any event — even Plaintiffs' own damages expert concedes that it is "speculative" and "indeterminate." This late-disclosed, legally unsustainable damages theory must be excluded in order to ensure that this case proceeds efficiently to trial and to avoid irremediable prejudice to Defendants.

This Court should exclude the claim for iPod profits for three independent reasons:

1. ***Plaintiffs inexcusably delayed in asserting a claim to iPod profits for nearly two years***. The inexcusable delay in and of itself is a sufficient basis to strike the demand. In every disclosure or discovery request relating to damages since this case was filed, Plaintiffs stated that they would seek Apple's profits from sales of the allegedly infringing records through the iTunes Store. After the case had been lingering for more than two years, Plaintiffs' damages expert inserted a cursory snippet into his expert report suggesting for the first time that Plaintiffs are entitled to profits in the multiple millions from the sales of iPods. The timing of this significant new damages theory coincided with the entry of final judgment in *F.B.T. v.*

Aftermath, another case between Plaintiffs' related LLCs and one of the Defendants here, in which Plaintiffs were on the losing end of a $2.5 million attorney's fee award. Plaintiffs' eleventh-hour attempt to add a whole new claim for damages in this case is an improper, transparent ploy to artificially inflate the settlement value of this case. The failure to timely disclose this damages claim requires its "mandatory and automatic" exclusion under Federal Rule of Civil Procedure 37.

2. ***Plaintiffs' claim for iPod profits is legally meritless***. The Copyright Act provides that the only profits potentially at stake in this case are those profits attributable to the allegedly infringing records. 17 U.S.C. §§ 504(a), (b). Plaintiffs' own expert, Mr. Cohen, testified just days ago that he cannot determine the connection between profits from iPod sales and the allegedly infringing uses here, and that the amount of profit attributable to any infringement is "speculative" and "indeterminate." Mr. Cohen further confirmed in his deposition that he cannot competently or reliably opine on this issue, as his "expert" opinion is based on sheer conjecture, "guesstimates" and his status as a "user" of the iPod and iTunes. Like another recent damages opinion of Mr. Cohen's that eventually led to his exclusion in the Southern District of New York, Mr. Cohen's opinion here is "built upon one flawed assumption after another[.]" *Robinson v. Sanctuary Records*, 542 F. Supp. 2d 284, 292 (S.D.N.Y. 2008), Under clear, settled law of this circuit, this Court, and several sister circuits, the speculative nature of this claim alone requires its exclusion.

3. ***Allowing Plaintiffs To Add In A Multi-Million Dollar Claim for iPod Profits at the Eleventh Hour Will Cause Irremediable Prejudice To Defendants.*** This case is set to be tried September 22, 2009. Although this lawsuit has been pending since July 2007, Plaintiffs did

not suggest they would claim damages for iPod sales until last month. In light of the claim's eleventh-hour introduction and the fast-approaching expert rebuttal disclosure deadline, Defendants have had no choice but to expend many hours and thousands of dollars in expert and attorneys' fees to refute this claim already. If this new damage theory is allowed to proceed, Defendants will suffer significant disruption of their businesses to counter a last-minute claim based on what Plaintiffs' expert concedes is mere conjecture, during a time in which the parties should be focused on preparing the most efficient and orderly presentation for this Court's consideration at trial. Moreover, if the iPod profit claim is allowed to remain in the case, Apple may be forced to have a number of its executives from a wholly separate business division never before implicated in this lawsuit appear at trial, on unreasonably short notice, leading to great disruption of Apple's business activities.

Every day that Plaintiffs keep in play their claim for iPod profits creates substantial and serious burdens in expense and time on Defendants that are unwarranted, especially in view of the iPod claims' wholly speculative and belated nature. Defendants ask this Court to make a threshold determination as to the claim's lack of any legal basis as the case law requires, and to issue an Order barring Plaintiffs' surprise claim for iPod profits.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. *July 2007-July 2009:* In Plaintiffs' Complaint, Disclosures and Discovery Responses, Plaintiffs Consistently Make Clear That Any Claim For Apple's Infringer Profits Will Be Based On iTunes Store Sales

Defendant Apple operates an online retail store called the iTunes Store, which sells records in the permanent download format, as well as other digital media content including movies, television programs, and audiobooks. Since its launch in 2003, the iTunes Store has carried downloads of recordings by the very popular hip-hop artist Eminem among its many millions of other available digital media products.[1] In July of 2007, after several years in which permanent downloads of the Eminem Compositions had been sold through the iTunes Store—and after Plaintiffs had received hundreds of thousands of dollars in mechanical royalties for such sales—Plaintiffs filed this copyright infringement lawsuit. In their Complaint, their ensuing Rule 26 disclosures, and throughout discovery, Plaintiffs consistently have maintained that the sole issue in this case is whether the iTunes Store's dissemination of the Eminem Compositions in permanent download form was authorized.

Similarly, until just over a month ago, Plaintiffs had consistently described the damages that they sought in the lawsuit, without any reference to iPods or iPod sales. Plaintiffs' Initial Disclosures, which have never been supplemented, never mentioned iPods as any part of their claim. Plaintiffs described their alleged damages as "the profits of Apple that are attributable to the digital reproduction, sale, and distribution of the Eminem Compositions, or alternatively, statutory damages[.]"[2] Ex. 1 at 4. Throughout nearly two years of fact discovery, Plaintiffs never hinted that they sought to expand their damages reach beyond the records embodying the Eminem Compositions sold through the iTunes Store. Defendants sought specific details of Plaintiffs' damages theories in discovery, giving Plaintiffs ample opportunity to assert this claim. Plaintiffs' responses never mentioned iPods at all, much less any claim on profits from the sales of iPods. Instead, Plaintiffs simply referred Defendants back to the Complaint — which said nothing about iPod profits — or repeated the language included in their initial disclosures. As recently as May, Defendants sought additional discovery on Plaintiffs' damages theories, but Plaintiffs did not timely respond to those discovery requests *at all*. Instead, Plaintiffs ignored the requests for weeks until finally serving responses in mid-July that also said nothing about iPod profits.

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[1] See an example of the many content offerings on the iTunes Store by visiting http://www.apple.com/itunes/whatson.

[2] The Copyright Act allows a plaintiff to elect between actual damages (consisting of Plaintiffs' actual damages plus infringer's profits not accounted for in such damages) or statutory damages. 17 U.S.C. § 504(a). Plaintiffs have not made an election of the type of damages they will seek in this case.

Plaintiffs' own discovery efforts never gave Defendants any reason to believe Plaintiffs were planning to raise this claim. While Plaintiffs served several extremely broad requests for financial information relating to the Eminem Compositions, none of their requests sought any information about iPods or iPod profits. In fact, Plaintiffs mentioned iPod profits explicitly only once during discovery, and then it was to *specifically disavow any claim of iPod profits as damages in this case*. Plaintiffs deposed Apple executive Eddy Cue, the head of Apple's iTunes Store, simultaneously for this case and the separate *F.B.T. v. Aftermath* case.[3] Plaintiffs' counsel asked Mr. Cue about iPods and profits from iPod sales. In response to objections, Plaintiffs' counsel stated that the issue had "nothing to do with profit issues with respect to profit and loss on the songs involved in the Eminem case." Ex. 2 [Cue Dep., 114:8-116:8].[4] When pressed further, Plaintiffs' counsel again stated that the iPod questions had "nothing to do with damages," and did not even pertain to this case, but instead pertained only to *F.B.T. v. Aftermath*. *Id*.

[3] As the Court may recall, Plaintiffs filed this case after the same plaintiffs-in-interest filed a related case, against Defendant Aftermath in the Central District of California, referred to in this brief as *F.B.T. v. Aftermath*. Discovery has been conducted in both cases simultaneously, with an agreement that some discovery may be used in both cases.

[4] The exhibits are highlighted for the Court's convenience. *See* R5 to the ECF Appendix, E.D. Mich. Civil Local Rules.

B. *March 2009*: Plaintiffs Lose The *F.B.T. v. Aftermath* Case

On March 6, 2009, the jury in the *F.B.T. v. Aftermath* case returned a unanimous verdict in favor of Aftermath and against Plaintiffs on Plaintiffs' claim for higher royalties for download sales through iTunes and other online retailers. On June 25, 2009, the District Court in that case awarded Aftermath its attorneys' fees and costs of approximately $2.5 million. Final judgment was entered on July 8, 2009, and the Plaintiffs have appealed.

C. *July 2009*: Plaintiffs Introduce Their Surprise Claim of Entitlement to iPod Profits

Fact discovery in this case closed over a year ago, on June 2, 2008. In December, discovery was reopened and extended to allow depositions and document discovery related to damages and other documents (not relevant here). Plaintiffs asked that Defendants supplement their responses to damages-related requests, and Defendants did so. Defendant Apple produced extensive revenue and cost data related to the sale of the recordings embodying the Eminem Compositions through the iTunes Store, and Plaintiffs deposed the iTunes Director of Finance on June 5, 2009.

It was not until July 3, 2009 – long after disclosures and fact discovery – that Plaintiffs for the first time hinted that they might seek profits from sales of iPod devices. In his expert report of that date, Mr. Cohen included three cursory paragraphs regarding what he believed were Apple's profits from the sale of iPod devices. Mr. Cohen did not say that Plaintiffs were entitled to such profits. He said much more obliquely that, "if all [of Apple's] overhead costs are allowed, then Apple should allocate to 8MS a share of its iPod hardware profits." Ex. 3 [Cohen Report at 6]. As to what that "share" would be, Mr. Cohen could not say. While Mr. Cohen mused that there could be some relationship between the sale of popular Eminem records as permanent downloads on iTunes and the sale of iPod devices to play them, Mr. Cohen did not say that he could measure that relationship. Far from it: he stated that “the portion of iPod profits attributable to 8MS Recordings is indeterminate.” Ex. 3 [Cohen Report at 5-6].

The seemingly off-the-cuff reference to iPod profits in Mr. Cohen’s report took Defendants utterly by surprise, especially in light of Plaintiffs’ counsel’s earlier express disavowal of any claim to iPod profits as damages in this case. Defendants thus asked Plaintiffs to clarify whether they were now seeking iPod profits as some component of their relief in this action. Ex. 4. Plaintiffs responded on August 3 — less than two months before trial is set to commence — with a terse, single line, stating that their damages claim includes “everything that is included in Mr. Cohen's report, including profits from iPod sales.” Ex. 5 [Aug. 3 email from Mr. Guilford to M. LeMoine]. Defendants then stated they would bring this motion to exclude that claim as legally unsupportable and procedurally improper, and Plaintiffs refused to consent to the clearly warranted relief.

III. ARGUMENT

A. Plaintiffs Impermissibly Surprised Defendants With This Substantial Damages Claim

Even if Plaintiffs’ claim for iPod profits were legally supportable — and it is not, as demonstrated below — it is procedurally improper. Under the Federal Rules, Plaintiffs simply cannot keep a potentially multi-million dollar claim of damages under wraps throughout the course of two years of litigation, and then suddenly redefine the stakes in a surprise disclosure on the eve of trial. Plaintiffs had an obligation to share — even without a discovery request — the basis for their claims of damages. Fed. R. Civ. P. 26(a). The failure to do that requires exclusion unless the failure was “substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

Plaintiffs cannot dispute that they never disclosed this theory of entitlement to iPod profits until shortly before trial. Indeed, the record clearly reflects that Plaintiffs' counsel *affirmatively disavowed* the theory in discovery. As the party that concealed this theory, Plaintiffs have the burden of proving that their failure was "substantially justified" or "harmless." *Roberts v. Galen of Va., Inc*. 325 F.3d 776, 782 (6th Cir. 2003). Absent that, the exclusion of the late-disclosed iPod profits "evidence" is "automatic and mandatory under Rule 37(c)(1)." *Dickenson v. Cardiac and Thoracic Surgery of Eastern Tenn*., 388 F.3d 976, 983 (6th Cir. 2004).

Plaintiffs will not be able to prove either "substantial justification" or "harmlessness." Defendants have already been harmed by this late disclosure, as explained further in Section C. As for what the purported "justification" would be, there is no justification — much less "substantial justification" — for keeping this claim of entitlement to iPod profits secret. Plaintiffs have known about the existence of the iPod and the iTunes Store since long before they ever filed this Complaint. This very Court presided over a previous dispute in 2004 between Plaintiff Eight Mile Style and Apple about an iPod commercial that Mr. Cohen now claims supplies some basis for the current iPod profits claim. Thus, nothing about the purported relationship between the iPod and the iTunes Store is newly discovered by Plaintiffs. Yet inexplicably they failed to mention this claim of damages for years.

Here, exclusion is warranted especially because Plaintiffs failed to disclose the theory *throughout* discovery, going so far as to specifically disavow it. Defendants sought extensive discovery and detail about the full scope of their damages claim, but Plaintiffs said nothing about iPods. Defendants relied on Plaintiffs' discovery responses and affirmative statements, the totality of which misled Defendants into believing that only sales of records of the Eminem

Compositions on the iTunes Store were at stake in this action. Under the circumstances, the late-disclosed damages theory must be excluded under Rule 37.

B. Plaintiffs' Claim For iPod Profits Is Legally Barred

Plaintiffs' claim for iPod profits not only was untimely disclosed. It also is entirely speculative, as their expert concedes, and thus clearly legally meritless under settled law.

1. To Seek iPod Profits, Plaintiffs Have Threshold Obligations (a) To Provide Detailed, Non-Speculative Evidence Linking The Claimed Profits To Infringement And (b) To Quantify The Amount Of Profits Attributable Infringement

Under the Copyright Act, plaintiffs who prevail in a copyright infringement action may elect to obtain "profits of the infringer that are *attributable to the infringement*[.]" 17 U.S.C. §§ 504(a), (b) (emphasis added). In the Sixth Circuit and this Court, the initial burden in any profits inquiry is squarely on the copyright owner, who "must first show evidence of the infringer's *gross revenue attributable to the infringement*." *Thoroughbred Software Int'l, Inc. v. Dice Corp.*, 488 F.3d 352, 360 (6th Cir. 2007) (emphasis added). A copyright owner has the burden of showing a "causal nexus" between the profits they are seeking, and the allegedly infringing use. *DaimlerChrysler Services v. Summit Nat'l,* 2006 WL 208787, at *4 (E.D. Mich. Jan. 26, 2006) ("To meet its initial burden, [the copyright holder] must establish a causal nexus between the infringing conduct and the infringer's gross revenue.") (internal quotations omitted). "When an infringer's profits are only remotely and speculatively attributable to the infringement, courts will deny recovery to the copyright owner." 4 Nimmer on Copyright, § 14.03[B][2].

When the copyright holder seeks to recover profits from a concededly non-infringing activity —like the sales of iPods here —those profits are referred to as "indirect profits." *See Mackie v. Rieser*, 296 F.3d 909, 914 (9th Cir. 2002) (distinguishing between direct profits as "those that are generated by selling an infringing product" and indirect profits as "revenue that has a more attenuated nexus to the infringement").[5] The proscription against recovery of remote and speculative profits has two important corollary rules of particular significance when indirect profits are sought. Both of these rules are fatal to Plaintiffs' belated iPod profits claim.

First, where, as here, the copyright owner seeks indirect profits, he or she has a "heightened burden" to link the revenue at issue to the claimed infringements. *See DaimlerChrysler Services*, 2006 WL 208787, at *3-*4 (discussing "heightened initial burden on the copyright holder" in indirect profits cases). In claims for indirect profits, the copyright holder "must do more than merely point to [the defendants'] balance sheet." *Id*. (quoting *Lowry's Reports v. Legg Mason*, 271 F. Supp. 2d 737, 751 (D. Md. 2003)). As another court in this district has explained, the plaintiff must present "detailed evidence linking gross revenues to the infringement." *Rainey v. Wayne State Univ*., 26 F. Supp. 2d 963, 972 (E.D. Mich.1998). That link between the gross revenues and the infringement "must be based on credible evidence, not speculation." *Thoroughbred Software*, 488 F.3d at 360 (quoting *Rainey*, 26 F. Supp. 2d at 971); *see also Niemi v. American Axle Mfg.*, 2008 WL 1837253, at *3-*4 (E.D. Mich. Apr. 23, 2008) (applying same rigorous standard to claim for indirect profits); *Mackie*, 296 F.3d at 915-16 (holding that "a district court must conduct a threshold inquiry into whether there is a legally sufficient causal link between the infringement and subsequent indirect profits," and that the evidence plaintiffs proffer must be "non-speculative" and "concrete").

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[5] Plaintiffs' claim is for "indirect" rather than "direct" profits because they do not claim that Apple's sale of iPods constitutes copyright infringement. Rather, Plaintiffs claim vaguely that there is a "synergistic relationship" between sales of iPods and the iTunes Store. Ex. 3 [Cohen Report at 6] That "synergistic relationship" leads them to conclude that some "indeterminate" portion of iPod profits is attributable to the iTunes Store, and, by extension, to the Eminem Compositions that are available as records sold on the iTunes Store. *Id*. Any profits from iPod sales are thus necessarily "indirect," because they are not directly attributable to the sale of an allegedly infringing product. *See Mackie*, 296 F.3d at 914.

Second, in addition to demonstrating a "causal nexus" between the claimed profits and the alleged infringement, Plaintiffs also must reasonably quantify the particular *amount* of profits that are attributable to the infringement. *Burns v. Imagine Films Entertainment*, 2001 WL 34059379, at *4 (W.D.N.Y. Aug. 23, 2001) (stating that infringement plaintiffs must "accurately calculate the portion of the profits attributable to the infringement.") Put another way, the amount of revenue or profits attributable to the allegedly infringing use must be "ascertainable." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 517 (9th Cir. 1985) (*Frank I*) *see also Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc*., 886 F.2d 1545, 1553-54 (9th Cir. 1989) (*Frank II*) (denying award because "the percentage of such profits attributable to the infringing material . . . is too speculative"). The failure to offer "reliable evidence to represent the measure of [defendants'] relevant profits" requires the dismissal of an indirect profits claim. *Thoroughbred Software*, 488 F.3d at 361.

Thus, a claim for indirect profits is speculative and therefore impermissible in two possible ways: (1) there may be an insufficient connection between the attenuated profits and the allegedly infringing use; or (2) it may be impossible to quantify how much, if any, profits are attributable to the allegedly infringing use. 4 Nimmer on Copyright, § 14.03[B][2]. Plaintiffs' iPod profits claim fails on both of these grounds.

2. Plaintiffs Fail To Establish The Required Causal Nexus Between The Alleged Infringement and Profits From iPod Sales

First, with regard to the required "causal nexus" between the profits sought and the allegedly infringing use, Plaintiffs simply cannot meet either the "heightened initial burden" imposed in indirect profits cases, or even the traditional burden of causation imposed in ordinary direct profits cases. Plaintiffs' own expert, Mr. Cohen, repeatedly conceded at deposition that *he does not know* what revenues from the sales of iPods are attributable to the alleged infringement of the Eminem Compositions. Ex. 6 [Cohen Dep.,113:14-24, 115:24-116:7, 117:25-119:3]. Mr. Cohen *does not know* whether Apple's sales of iPods would have increased or decreased if the Eminem Compositions had not been available on the iTunes Store. *Id*. at 111:2-113:3. The most Mr. Cohen can testify to is a vague connection between iPods and the iTunes Store in general, based solely on his experience as an iPod and iTunes user. *Id*. at 102:19-103:13. In his words, there is "some indeterminate link between iTunes and iPod" and the income from iPod sales is somehow "tangentially connected to the iTunes Store." *Id.* at 124:22-25, 95:17-96:3. But Mr. Cohen cannot or will not tie that "indeterminate link" or "tangential connection" between iPod sales and the iTunes Store *to the allegedly infringing uses here*. The law requires that connection to sustain the claim.

The only connection between the iPod and the Eminem Compositions that Mr. Cohen even points to are two television commercials. One of those commercials rarely (if ever) aired, featured no Eminem recordings and no reference to iTunes, and was the subject of an infringement claim before this Court that was long ago settled. The other was, ironically, a *fully licensed* use in a television commercial that briefly aired advertising the availability of Eminem's greatest hits album on iTunes. The composition used in that commercial was "Lose Yourself." As this Court is aware, "Lose Yourself" is the only composition that Plaintiffs *admit* to licensing for distribution in permanent download form. So, the only shred of evidence of any connection between iPods and records embodying the Eminem Compositions available on iTunes is *a fully* *licensed use in a commercial*, featuring a composition that was *fully licensed for distribution on iTunes*. A commercial containing *no allegedly infringing elements* cannot be sufficient to support a claim for profits derived from sales of the advertised product.[6]

The failure to identify a connection between the allegedly infringing products—not just the store that sold them—and the claimed profits is itself a sufficient independent basis to strike Plaintiffs' claim of entitlement to iPod profits.

3. Plaintiffs Cannot Quantify The Claimed Profits Attributable To Infringement With Any Degree Of Certainty: Their Damages Expert Concedes That Any Attempt To Guess The Amount Is "Indeterminate" And "Speculative"

Plaintiffs' attempt to inject profits from iPod sales also fails the second requirement under the case law: Plaintiffs cannot quantify the particular amount of revenue or profits that should be considered in analyzing their iPod profits claim with any reasonable degree of certainty. Mr. Cohen repeatedly stated that he *could not say* what amount of iPod profits is traceable to the existence of the iTunes Store, much less what amount is traceable to the availability of permanent downloads of records embodying the Eminem Compositions. Mr. Cohen testified that the amount is "indeterminate. It is speculative." Ex. 6 at 113:23-114:3. As Cohen explained, "[I]t would be speculative to be, to determine exactly how much in iPod sales are influenced by iTunes sales." *Id*. at 114:5-7. Cohen further confirmed that "it is difficult to ascribe a percentage relationship," and that he could not "ascertain" the correct number. *Id.* at

[6] Mr. Cohen also relies on the deposition testimony of Mr. Cue, the head of the iTunes Store, for the notion that the iTunes Store "helps" sell iPods. The Court can review this portion of Mr. Cue's testimony at Exhibit 2, pages 112-114. What Mr. Cue actually said was that the iTunes Store, "helps, but--" and then he was cut off by Plaintiffs' counsel. Mr. Cue's unfinished thought in response to a question presuming a connection between the iPod and the iTunes Store is hardly sufficient non-speculative, credible evidence to tie the *allegedly infringing Eminem Compositions* to iPod sales.

114:8-14. Unfortunately for Cohen and Plaintiffs, this is exactly what the cases require. *See Frank I*, 772 F.2d at 517 (a claim for indirect profits must be "ascertainable").

If the amount is, as Mr. Cohen testified *twice*, "speculative," then it is simply not recoverable under the Copyright Act. When even Plaintiffs' expert is unable to either define the connection between the attenuated profits and the allegedly infringing use, or to calculate what amount would be attributable to the allegedly infringing uses, the indirect profits claim must be excluded.

Lowry's Reports v. Legg Mason, Inc. illustrates this rule. Lowry's sued for infringement of their copyrighted analyst reports, which they claimed defendant Legg Mason had copied and distributed to its own analysts. The Legg Mason analysts then incorporated what they had learned from the infringed Lowry's reports into the stock advice they gave to Legg Mason's clients. 271 F. Supp. 2d at 752. As with Plaintiffs' iPod profits claim here, the plaintiffs did not claim profits directly from the alleged copying. Rather, they claimed profits from a larger income-generating activity, of which the copying was only a very small part. And just as in this case, Lowry's expert could not draw the necessary connection between the allegedly infringing use and the profits sought. *Id*. The most Lowry's expert could say is that the copied reports *should have had* some positive effect on profits. But just like Mr. Cohen, Lowry's expert was not able to say what that effect actually was. The Lowry's Court thus held that the claim for Legg Mason's profits "must fail." *Id*.

Similarly, in the Ninth Circuit case of *Mackie v. Rieser*, the plaintiff claimed that the Seattle Symphony had incorporated the plaintiff's artwork into a direct mail brochure advertising the Symphony's Pops series. 296 F.3d at 912. The plaintiff claimed entitlement to the

Symphony's profits from sales of subscriptions to the Pops series, alleging that those sales were attributable to the infringing advertisement. *Id*. at 913. As in this case, the plaintiff's expert in *Mackie* could not quantify how much of the Symphony's sales were attributable to the infringement. *Id*. at 916. Specifically, the expert stated that "he could not 'understand' how it would be possible to establish a causal link between" the allegedly infringing use and any revenues generated through the inclusion of the infringing work in the direct-mail campaign. *Id*. In light of the "virtually endless permutations" the Court could imagine to account for consumers' decisions to subscribe — all of which had nothing to do with the artwork in question — the Court upheld the district court's decision that the plaintiff had failed to articulate a non-speculative correlation between the infringing use and subsequent revenues from the Pops series. *Id*.

The same result is compelled here given the deposition testimony of Plaintiffs' own expert. When Plaintiffs' own expert *cannot explain* how iPod sales may have been affected by the presence of records embodying the allegedly infringing compositions on the iTunes Store, how is this Court to conclude that iPod profits were affected? To do so would require the Court to discount the myriad other reasons consumers might purchase iPods, just as the Ninth Circuit would have had to discount the myriad other reasons consumers might have subscribed to the Seattle Symphony Pops series. As Mr. Cohen testified, it would be irresponsibly "speculative" to identify a portion of iPod sales that has any connection to the allegedly infringing works here. As the *Lowry's* and *Mackie* Courts did, this Court should take Plaintiffs' expert at his word and exclude the claim for iPod profits.

4. The Only "Evidence" Plaintiffs Would Be Able To Present On This Issue Is Mr. Cohen's Opinion, Which Is Wholly Inadmissible Under Federal Rule of Evidence 702

If the overwhelming precedent were not more than enough to bar Plaintiffs' claim for iPod profits, the claim would still need to be excluded from this case because the expert's opinion offering it is inadmissible under Federal Rule of Evidence 702. As amended after *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and its progeny, Rule 702 requires Mr. Cohen's opinion on the iPod profits issue to be based on some "knowledge, skill, experience, training, or education[.]" *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 528-529 (6th Cir. 2008). Further, Cohen's opinion must be based on "sufficient facts or data," and be the product of "reliable principles and methods" that have been reliably applied to the facts of this case. *Id*. at 529; Fed. R. Evid. 702. Mr. Cohen's opinion is based on general knowledge or sheer conjecture, and utterly fails Rule 702's reliability requirements.

Mr. Cohen has no training, experience, or specialized knowledge about the very subject on which he is opining: why consumers buy iPods. Nor has he endeavored to educate himself on that issue. That is made abundantly clear by the host of factors he fails to consider. Mr. Cohen considers no other reason besides the existence of the iTunes Store— not the sound quality, not the size of the product, not Apple's brand, not the resolution of iPods' video displays, nothing. Ex. 6 at 116:8-117:24. Mr. Cohen "guesstimates" that "well over 95%" of the music on a particular iPod comes from the iTunes Store, based on nothing other than sheer conjecture. *Id.* at 101:24-102:2. Based on his experience as "an iPod and iTunes user," he baldly claims that the iPod has no value without iTunes, a highly dubious assertion in light of the fact that millions of people bought iPods long before the iTunes Store ever opened. *Id.* at

102:19-103:3. Mr. Cohen's lack of knowledge is not surprising. He works for recording artists as a royalty auditor, not a marketing expert. He has no knowledge of why consumers do anything, much less whether they purchase digital media players based on the availability of certain compositions on the iTunes Store.

Mr. Cohen's musings, even putting to the side their lack of substance, are also utterly unreliable. They are not based on any recognizable methodology, and Mr. Cohen does not offer one on which any opinion could be based. While he believes there is some "indeterminate link" or "tangential connection" between the iPod and the iTunes Store, he says there is no measure of what that link might be. He throws out a gross profit number in the multiple billions for worldwide iPod sales gleaned from five years of securities filings, but he cannot say what the "correct" amount attributable to the Eminem Compositions could be. Although he proposes a calculation that could be performed to obtain a "maximum," even he concedes that calculation is wrong. Under Cohen's own deposition testimony, *there is no reliable methodology* from which he can competently opine on the iPod profits issue. This opinion must then be stricken under Federal Rule of Evidence 702.

This is not the first time Mr. Cohen has attempted to go beyond the bounds of his capabilities as a royalty auditor to expound on topics about which he has no specialized knowledge. And, it is not the first time Mr. Cohen has offered an opinion entirely unreliable and thus inadmissible under Rule 702. In *Robinson v. Sanctuary,* the Southern District of New York excluded Mr. Cohen's multi-million dollar damages figure, because it was "built upon one flawed assumption after another[.]" 542 F. Supp. 2d 292. In *Robinson,* the plaintiffs attempted to defend Cohen's flawed assumptions alleging that they had not had access to adequate discovery. Here, Mr. Cohen attempted to do the same thing, but of course the failure to disclose this theory in discovery is Plaintiffs' own fault. *See* Ex. 6 at 21:3-5 [Mr. Cohen complains of lack of access to Apple's "books and records"]. In fact, the only difference in this case is that here, Mr. Cohen himself concedes that the only methods he can conceive of to determine any particular damages figure are unreliable, making this Court's decision much more straightforward. All references to iPod profits in Mr. Cohen's proposed testimony must be excluded.

C. Plaintiffs' Late Attempt To Add Their Baseless Damages Claim For Apple's Profits From iPod Sales Will Cause Incurable Prejudice To Defendants

The surprise tactics the Plaintiffs employed here are wholly improper, and have substantially prejudiced Defendants in their ability to defend against this iPod profits claim.

First, Plaintiffs' tactics have deprived Defendants of a fair opportunity to adequately prepare for trial on this newly unveiled damages theory. If the Court were to determine that Plaintiffs have somehow met their burden of demonstrating a causal link between iPod profits and the allegedly infringing uses of the compositions, then the burden would shift to Defendants to establish their deductible costs, and to deduct those portions of the gross revenue between that are attributable to factors other than the alleged infringement. But, until today, there has not been a single shred of evidence in the record about why consumers purchase iPods, or what the deductible costs from the iPod business might be. Plaintiffs never sought those costs, and never disclosed that iPods were at issue in this case, so Defendants had no knowledge that they would need to rely on such information. Defendants will be hampered significantly if they are forced to defend against this claim on the available record, or will be further prejudiced if they are now

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forced, in the limited time available, to scramble to dig up evidence and prepare key executives with no knowledge of this case to counter these specious and speculative claims.[7]

Second, Plaintiffs' incomplete afterthought of an expert disclosure on this topic deprives Defendants of a meaningful opportunity to rebut it. Not only have Defendants had to retain an expert to prepare an expert report to address an issue that a few short weeks ago had not even been raised in this case, but Defendants and their expert do not even know *what the opinion is* that they must rebut. Plaintiffs have not specified what revenue numbers they believe are reachable by their claim for iPod profits. Mr. Cohen's opinion, especially after his deposition, is entirely unclear as to *exactly what revenues* Plaintiffs claim are attributable to the infringing uses here. The failure to quantify this damages figure even at this late date amounts to a continuing failure to meet their own expert disclosure obligations, and thus continues to severely prejudice Defendants in crafting an appropriate response.

Finally, it is time for this litigation to end — not time to start from scratch with brand new theories and pleadings. Plaintiffs may be asserting belated claims of damages like this iPod profits claim and filing motions to amend the complaint on the eve of trial in an effort to postpone the trial date in this case yet again. That is unacceptable, and would substantially prejudice Defendants. The parties have conducted discovery long enough, and Plaintiffs must now be put to their burden before this Court.

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[7] And any need for Apple to provide testimony or evidence regarding the confidential details of Apple's iPod business would be highly prejudicial in itself, particularly in light of Plaintiffs' cavalier disregard for the strictures of the Protective Order controlling this case thus far. Plaintiffs have admitted to violations of the Protective Order that include sharing Apple's sensitive cost data with unauthorized parties. Defendants have repeatedly asked Plaintiffs to confirm that they have corrected these violations, but as of this writing Plaintiffs have refused to do so.

IV. CONCLUSION

In sum, the prejudice to Defendants is manifest from Plaintiffs' last-minute attempt to add a legally meritless iPod profits theory. That theory should be stricken on any one or more of these aforementioned three grounds.

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2009, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the all counsel.

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